

REMARKS/ARGUMENTS

The present Amendment is in response to the Official Action mailed October 27, 2008. Claims 1-4, 8, and 9 have been amended. Claims 14-23 are new. Claims 5, 11, and 12 were previously canceled. Thus, claims 1-4, 6-10, and 13-23 remain pending in the present case. Because of the finality of the Action, and because of certain indications made by the Examiner (discussed below), the present Amendment is being submitted along with a Request for Continued Examination ("RCE"). The following sets forth Applicants' remarks pertaining to the currently pending claims and the outstanding Action.

As an initial matter, Applicants thank the Examiner for conducting the brief telephone discussion on March 3, 2009 with the undersigned. During the discussion, the present amendments directed to a relative angle designation mark were proposed to the Examiner, who stated that although such amendments may overcome the outstanding rejections, further search and consideration would be required. The Examiner indicated that he would not be mailing an Interview Summary regarding the details of the discussion as such was brief and did not involve the nature and substance of the rejections. Therefore, Applicants have submitted an RCE with the present amendments in order to further prosecution in this matter.

In the Action, the Examiner rejected previously presented claims 9, 10, and 13 under 35 U.S.C. § 103(a) as being obvious over the combination of U.S. Patent No. 6,425,920 to Hamada ("Hamada"), U.S. Patent No. 5,306,308 to Gross et al. ("Gross"), and U.S. Patent No. 5,501,269 to Büttner-Janz et al. ("Büttner-Janz"); and previously presented claims 1-4 and 6-8 under 35 U.S.C. § 103(a) as being obvious over the combination of Hamada, Gross, Büttner-Janz, and U.S. Patent No. 6,277,149 to Boyle et al. ("Boyle"). Essentially, the Examiner asserted in the Action that each and every limitation of previously

presented claims 1-4, 6-10, and 13 was obvious in view of the different combinations of references set forth in the Action.

Independent claims 1, 4, and 9, as amended herein, are directed to an intervertebral spacer comprising, among other elements, at least one relative angle designation mark on at least one of its upper and lower surfaces. Such marks provide a visual indication to the surgeon of the amount of rotation of the spacer in the disc space. As recited in dependent claims 3, 8, and 14, each spacer may include two relative angle designation marks on at least one of the upper and lower surfaces such that the surgeon may determine the rotational angle of the spacer relative to a known reference. The marks may also serve as a guide for the implantation of a secondary bone graft (e.g., a femoral ring) or another intervertebral spacer device.

Applicants respectfully submit that the limitation of a relative angle designation mark is not taught by any of the cited references. In the Action, the Examiner points to line slots (207) in *Hamada* as disclosing such marks, although line slots (207) are not similar to or as useful as the relative angle designation marks of the present invention. In fact, *Hamada* specifies that line slots (207) are cut to a depth of about one to one and a half millimeters. (See *Hamada* col. 17 ll. 40-43.) The composition of the adjacent vertebral bodies as well as the pressure exerted by each on the implant would cause each vertebra to yield by at least one millimeter, which would effectively hide line slots (207) from the surgeon's view immediately upon insertion of the implant. Line slots (207) would therefore not provide the visual marker to a surgeon in order to properly align the device between the vertebral bodies. Moreover, *Hamada* discusses many advantages for the inclusion of line slots (207), such as providing additional surface area for bone ingrowth, enhancing the positioning of the implant and its

attachment to a tool, and providing an indication of its insertion direction prior to implantation. (See *Hamada* col. 17 ll. 46-58 and col. 19 ll. 4-14.) However, it is telling that *Hamada* does not mention line slots (207) as being utilized for reference or angular positioning after the implant has been inserted. Furthermore, as line slots (207) are linear and intended to have a "barb effect," such would actually teach away from rotation of the implant after insertion.

Accordingly, each of independent claims 1, 4, and 9 has been amended to more clearly recite that the spacer body includes at least one relative angle designation mark on at least one of the upper and lower surfaces. Applicants note that while claim 9 previously included such a limitation, the language in claim 9 has been reordered to avoid any potential issue with respect to antecedent basis of the elements recited therein. Therefore, Applicants respectfully submit that independent claims 1, 4, and 9, as amended, are distinguished from and allowable over the prior art cited by the Examiner. Additional amendments have been made to dependent claims 2, 3, and 8 for consistency with the above-described amendments and to correct certain apparent antecedent basis issues. New claims 14-23 further define the at least one relative angle designation mark. No new matter is included in the present claim amendments and additions. Indeed, a spacer including a relative angle designation mark is disclosed, for example, in paragraphs 27, 40, 92-93 and 113 of the disclosure and in Figures 4a-4d. Given that claims 2-3, 6-8, 10, and 13-23 properly depend from one of independent claims 1, 4, and 9, such claims also necessarily overcome the prior art. Such claims may also include separate utility from the independent claims. Accordingly, Applicants respectfully request allowance of each and every one of claims 1-4, 6-10, and 13-23.

In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is respectfully requested to withdraw the outstanding rejection of the claims and to pass this application to issue.

If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicants' attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

If there are any additional charges in connection with this requested amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

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Respectfully submitted,

By 

Charles H. Humkey

Registration No.: 60,702

LERNER, DAVID, LITTENBERG,

KRUMHOLZ & MENTLIK, LLP

600 South Avenue West

Westfield, New Jersey 07090

(908) 654-5000

Attorney for Applicants

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